THE SUPREME COURT OF MISSOURI

M.A.	)	
	)	
Appellant,	)	
	)	
v.	)	No. SC 86006
	)	
M.S.,	)	
	)	
Respondent.	)	

Appeal from the St. Louis County Circuit Court
Division 34
Judge Joseph A. Goeke, III
Transferred by the Missouri Court of Appeals, Eastern District

Substitute Brief of Respondent, M.S.

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v.	)	No. SC 80060
	)	
M.S.,	)	
	)	
Respondent.	)	

JURISDICTIONAL STATEMENT

Respondent ("Father") adopts Appellant's ("Mother") jurisdictional statement and acknowledges that this court has jurisdiction over this appeal.

STATEMENT OF FACTS

Introduction

Missouri S. Ct. Rule 84.04(c) requires Appellant to set forth a "fair and concise statement of the facts relevant to the questions presented for determination…" The statement of facts must also set forth all of the evidence that supports the judgment. *S.R. v S.M.R.*, 709 S.W.2d 910 (Mo.App. E.D.1986).

Mother's statement of facts, while accurate in its presentation of a selection of trial evidence and testimony that support's Mother's view of the case, fails to set forth certain key facts and aspects of the evidence that were the foundation of the trial court's findings. Thus, Father sets forth certain additional facts that that support the judgment:

Facts in Support of the Judgment

Marie Clark, head of Behavioral Science Institute ("BSI"), an agency that works

with sex offenders, testified on behalf of Mother by way of her deposition. Petitioner's Exhibit ("Pet. Ex.") 6. She stated that Father is at "low risk" for perpetrating a sexual offense. Pet. Ex. 6 at 22. "[H]e has actually appeared to internalize the information that is given to him….He's made some – what we consider significant changes in his life in terms of socializing and other factors that play into the role of why someone may choose this as a behavior." *Id.* She further stated that Father has "come a long way" from the "victim mentality" he had when he began the BSI program in June 1993. Pet. Ex. 6 at 21.

A letter was admitted into evidence from BSI, dated February 27, 1998, stating that Father was "at minimal risk for molesting his children." Resp. Ex. D.

Terry Rohen, a psychologist who had examined and evaluated Father, testified on behalf of Mother. Transcript ("Tr."), 281, *et seq.* Rohen acknowledged his high regard for Marie Clark, and considered her a "tough counselor." Tr. 348. He agreed that BSI would be an institution he would recommend for treatment of a sex offender. Tr. 349. He relied upon documents he received from BSI in compiling his report and recommendation. Tr. 350.

Rohen stated that it is important for the children to have a relationship with their father, and that it was important for the children to spend time with their father. Tr. 340. Rohen testified at trial that it would be "a hard question for me to answer" when asked whether terminating Father's rights to see the children would be damaging to the children. However, he acknowledged that, when his deposition was taken on June 19, 2002, he had testified that blocking Father's access to the children would be "likely damaging" to the children. Tr. 346.

When asked whether Father were sexually attracted to infants, pre-adolescents, teenagers, or boys, Rohen answered "no." Tr. 354. When asked whether Father had sexual fantasies about infants, pre-adolescents, teenagers, or boys, Rohen answered "no." Tr. 354-55. He stated that within the last ten years he knew of no aggressive actions perpetrated by Father, or police incidents involving him. Tr. 385. He also knew of no physical fights Father had been involved in, no work suspensions, and no hostile acts of any kind by Father in the last ten years. Tr. 385-86.

Rohen testified that Marie Clark had developed rules placing certain limitations on Father's behavior during visitation sessions, but admitted that he did not know whether or not those rules had ever been provided to Father. Tr. 389. Nonetheless, he stated that Father had only violated those rules on one occasion, by lifting and putting down his daughter. Tr. 390.

Rohen further acknowledged that Father had fallen within the normal range on the psychological tests that measured his frankness in answering questions. Tr. 355-56. Rohen stated that none of the results from any of the tests he administered to Father are predictors of future sexual acts. Tr. 378. He also confirmed that Father had not violated his probation, nor committed any inappropriate sexual acts in the past ten years. Tr. 395, 354.

Rohen testified that Father had never committed any offense against a pre-adolescent or teenage girl. Tr. 396. He also stated that the parties' daughter, R.S., had no memory of the acts that had been perpetrated against her, and suffered no trauma from those acts. Tr. 397. Although Rohen believed that both children had psychological

problems, he doubted those problems were the result of anything Father had done. Tr. 422, 426.

Rohen testified that the parties' son, J.S., was not at risk of being sexually molested by his father, and that no supervision was required for Father's exercise of visitation with J.S. Tr. 359-62.

Rohen was not able to opine whether or not the tests he conducted were any more or less valid than those conducted by Father's expert, Dr. Dean Rosen. Tr. 380.

Dr. Rosen is a clinical psychologist, whose practice includes the treatment and evaluation of sexual offenders. Tr. 101-02. He did such an evaluation of Father in this case. He used some of the same tests as Rohen, including the MMPI-2. Tr. 116. He noted certain significant differences between the results of his testing compared with those of Rohen. Tr. 120-21. While Rohen measured Father as falling outside the norm on the "psychopathic deviant scale," Rosen found Father to be within the norm on that scale. Tr. 121. He described other differences between the two tests as being less significant. Tr. 122-23. He stated that since the test is used to predict behavior, the only way to determine which test results were more accurate would be to look at what behavior ensued. Tr. 124.

Rosen also relied upon information he received from BSI. Tr. 130. He noted that, as of 1998, the BSI staff had listed Father as a low risk for sexual abuse. Tr. 134. Resp. Ex. I.

Rosen drew several conclusions from his evaluation of Father. First, Rosen testified that "it's clear that [Father] completed without incident" his program of

treatment at BSI. Tr. 136. He stated that BSI's program was a "highly-respected, long-term, highly-structured sexual offender treatment program that is well accepted by the Probation and Parole Departments in St. Louis County." *Id.* He noted that BSI is highly regarded because it is "tough" and "highly confrontational," meaning that it uses "many, many rules." Tr. 136-37. He added that "if somebody successfully completes their program and gets a rating from them that they're at low risk, I have high confidence in them." Tr. 137.

Second, Rosen testified that Father had been rehabilitated "because he can take full responsibility for his offense. He can show appropriate remorse. He can identify the factors that led up to his offense. He can show appropriate empathy for the victim and understands the impact of his behavior." Tr. 138.

Rosen testified that a purpose of treatment is to get patients "to the point that they can express their remorse, show it and hopefully heal it…, " adding that remorse is a part of taking responsibility for one's actions." Tr. 113.

Third, Rosen stated that Father could successfully control any impulses he might have to commit any sexual offenses, noting that he was unaware that Father harbored any such impulses. Tr. 139. He testified that Father had gone ten years without committing any offense, and that he had "grown and matured with enormous amounts of therapy and supervision over those ten years." Tr. 138.

Fourth, Rosen opined that Father was not a pedophile, in that he was not persistently attracted to children, and that he was not sexually attracted to either of his own children. Tr. 140-41.

Fifth, Rosen concluded that the children would be safe if left unsupervised in Father's care because there was little likelihood that Father would act out sexually against them. Tr. 141-42.

Sixth, Rosen testified that, generally, it is in the best interest of children that they have a normal relationship with their father, and that supervision can promote anxiety in children. Tr. 142-43.

Finally, Rosen concluded that Father would be safe around children. Tr. 144.

Judge Goeke asked Rosen to interpret a form from BSI that had been completed on April 2, 1998, as part of Father's work with that agency. Resp. Ex. I. That form included a series of questions, one of which was, "10. Has approval for unsupervised contact with minors." That question had been answered in the negative on the form. *Id.* The court wished to know whether that answer meant that BSI did not approve Father for unsupervised visits, or whether that response was simply a reflection of the reality that Father was under court orders not to have unsupervised visits with the children. Tr. 145. Rosen stated that this answer was merely a fact statement, and that this interpretation was consistent with his conversations with Marie Clark. Tr. 146.

Father's therapist, Mark Robinson, testified on Father's behalf. Tr. 192, *et seq*. Robinson is the director of the abuse prevention program of the Center for Creative Conflict Resolution. Tr. 193. He holds the degree of doctor of ministry and pastoral counseling. *Id.* His curriculum vitae listed him as a fellow of the American Association of Pastoral Counselors. Resp. Ex. J. He explained that pastoral counseling differs from psychological counseling in its focus on "amelioration of problems and … therapy,"

rather than on testing and evaluation. *Id.* Robinson also testified that he was listed as an approved sex offender treatment provider by the Missouri State Board of Probation and Parole. Tr. 194. Resp. Ex. J. He had previously testified in court as an expert on sex offenders ten or fifteen times. Tr. 194.

Robinson's involvement in this matter came with a referral from Tom Weber, of the domestic relations services, which is an arm of the St. Louis County Family Court. TR. 195. Robinson both provided additional treatment to Father, and served as a supervisor for Father's visits with the children. Tr. 201. At the time Father entered Robinson's program, he had completed the program at BSI. Tr. 198. Robinson acknowledged that BSI is "probably the largest provider of sex offender treatment within St. Louis City and County." *Id.* Father successfully completed phase one of Robinson's program in August 2000. Tr. 200; Resp. Ex. K.

Robinson prepared a report on May 14, 2002, which was received by the court. Resp. Ex. K. Both in his testimony and in this report, Robinson expressed the opinion that he had "always seen…as unlikely" the possibility that Father would "engage in criminal acts of abuse toward the children." *Id.*; Tr. 204. In his supervision of visits, he noted that Father had occasionally voiced his frustration in the children's presence in ways that were "well within the range of what most parents do from time to time." Resp. Ex. K. He pointed to Father's "ability to 'own' his behavior" in these instances, which suggested to Robinson Father's insight into his own internal conflicts, and which, in turn, rendered Father's likelihood of acting out with criminal behavior unlikely, particularly against his own children. *Id.*

Robinson pointed out that Father's prior "sexual impulsivity" had stemmed, in part, from Father's inability to constructively deal with stress in adult relationships. *Id.* He reported that Father had gained the ability to address stress more constructively, and listed, as an example, his willingness to deal with his current wife directly. *Id.* He also noted in his testimony that Father is not a pedophile, since he did not turn to relationships with children for intimacy. Tr. 207.

Finally, Robinson suggested in his report that "the guidance of a competent therapist" would assist in relieving any tension on the part of the children that might result from the removal of supervision after so many years. *Id.*

In his testimony, Robinson focused on several factors that led to his conclusions. He noted that with time, the likelihood of an offender re-offending becomes lower. Tr. 204. He also stressed the importance of Father's internal controls that would prevent him from committing an offense. Tr. 205. He found Father's self-report of his own offense to be evidence of Father's concern about his own behavior. *Id.* Adding these findings to Father's successful completion of the BSI program, Robinson believed that Father presented a low likelihood of re-offending. *Id.*

Father also testified on his own behalf. Tr. 13, *et seq*. He stated that after he told his pastor that he had sexually molested his daughter, he sought counseling, was reported to the Division of Family Services, and was admitted to the hospital. Tr. 16-18. He was charged with sodomy, to which he pled guilty, he received a suspended imposition of sentence, and was placed on probation. Tr. 19.

He began treatment at BSI in 1993, even prior to his being placed on probation,

and remained there as a condition of probation. Tr. 22. Father continued in treatment on a weekly basis for six years, finally completing the program successfully. Tr. 21, 22. In 1999, although he had completed the BSI program and was no longer on probation, Father continued in counseling on a voluntary basis with Mark Robinson. Tr. 24-25. This course of counseling was focused on preventing any future abuse. Tr. 25.

Father and Mother were divorced in 1995, and, although no allegation was ever made that Father abused J.S., the dissolution judgment reflected Father's agreement that he would be supervised for his visits with both children in order not to show favoritism of one child over the other, since neither child knew the reason for the supervision. Tr. 26. The judgment did not contain any order that Father not inform the children of the reason for the supervision, but Father had never told the children why the supervision was in place. Tr. 29.

Father's supervised visits began in 1993, beginning with four hours each week. Tr. 28. In 1999, the parties agreed to an increase in Father's time with the children, to six hours each week, but supervision remained in place. Tr. 28-29. Father did not believe at that time that the children were old enough to allow the supervision requirement to be lifted. Tr. 29.

In 2001, Mother filed a motion to allow her to relocate with the children to the state of New Jersey, which Father did not contest. Tr. 30. Mother promised Father that he would have the same amount of time with the children as he was getting while Mother lived in St. Louis, but the modification judgment simply contained a range of time Father would receive, from seven to thirty days each quarter, to be scheduled as agreed upon by

the parties. Tr. 31; L.F. 61. Father testified that he actually received the children for considerably less time than what he had enjoyed prior to the modification. Tr. 33.

Father testified to numerous problems that had occurred with arranging supervision following this modification. Tr. 34, *et seq.* Under the terms of the 1999 modification, Marie Clark, or her designee at BSI, was named as the person to select supervisors for Father. L.F. 42-43. Marie Clark subsequently withdrew from her role in the case, and Marilyn Milligan and Mike Clayton were later named as supervisors. Tr. 35.

On ten different occasions, Mother denied Father the right to see the children because she objected to the use of Mike Clayton. Tr. 46. In addition the supervision had been intrusive, in that the supervisors, rather than acting like a "fly on the wall," were preparing food and playing with the children, activities that Father believed he could, and should, do himself. Tr. 37-38.

Father listed his reasons for objecting to the supervision of his visits with the children. He believed that the supervisors' taking over responsibilities, rather than simply observing, interfered with his relationship with the children. Tr. 38. He also believed that when the children were dealing with the supervisors, it was taking away from his time with them. *Id.*

Father testified that his treatment and counseling had allowed him to understand the impact of his actions on his family and, specifically, on R.S. Tr. 39. He also believed that he could now control his actions in ways he could not in 1991, when the abuse was perpetrated. *Id.* He stated that he had not committed any acts of abuse since having done

so against his daughter, nor had he committed improper acts with anyone else. Tr. 40-41.

Father also testified that, since Mother had moved to New Jersey, his involvement with the children had decreased in other ways. Mother only started conferring with Father about decisions involving the children's health, education, and welfare after Father filed his motion to modify. Tr. 47. Even then, her "conferring" consisted of informing Father of her decision, rather than asking his opinion. *Id.* In addition, the children were not returning his telephone calls to them, and he was not being informed about the children's medical condition. Tr. 48. On one occasion he received a telephone call from R.S., informing him that she had been in a skiing accident, and that her mother had asked her to call him because he would be receiving a bill. Mother never informed him of the accident directly. *Id.*

Mother also prevented Father's mother from taking one of the children to a Muny performance in St. Louis, even though Father was not going to be present. Tr. 49.

Accordingly, Father sought to be granted joint legal custody so that he could be involved in the decision making process for both children. Tr. 49-50. He stated his belief that he and Mother could jointly make decisions. Tr. 50.

The Guardian ad Litem, Dudley Dunlop, gave his recommendation at the close of three days of evidence. He stated that he was "satisfied that [Father] went to the most outstanding treatment facility in this area and participated in their program for years…and he's done everything, jumped through their every hoop." Tr. 689. He noted that Father had, through the course of his work with BSI, changed from being assessed at an extremely high likelihood of re-offending, to "seven or eight x's in the low category."

Id.

In addressing the best interests of the children, the Guardian pointed out that they were entering their teen years, and that a relationship with their father would benefit them particularly at this time. Tr. 690. He asked the court to come up with a means of keeping the supervision in place until the children could receive a therapeutic intervention to understand what led to the requirement of supervision. Tr. 691. He stated his concern that the children had not been sufficiently prepared to deal with the many people with whom they would come into contact, and who would be potential abusers, not just their father. Tr. 696. However, he referred to "this ridiculous supervision" as being "so intrusive that at the very least I would hope that this court would modify the supervision requirements…" *Id.*

Finally, the Guardian expressed his opinion that "I don't believe that [Father] is much of a risk of anything more than a normal risk of re-offending. And I believe he's rehabilitated. He's certainly had more treatment than almost any pedophile that I've ever had to deal with." Tr. 695.

POINTS RELIED ON

I.

The trial court's refusal to dismiss Father's motion to modify custody correctly applied the law in that, to the extent the provisions of § 452.400.1, RSMo apply to modifications of previously awarded visitation, and to the extent the provisions of § 452.375.3, RSMo apply to modifications of previously awarded custody, those provisions violate Father's rights under Article I, § 10 of the Missouri Constitution and the Fifth Amendment to the U.S. Constitution as applied to the states by the Fourteenth Amendment, for the following reasons:

A) Application of §§ 452.400.1 and 452.375.3 deprives Father of a fundamental right under the Constitution, the right to maintain a parental relationship, without due process of law.

B) Application of §§ 452.400.1 and 452.375.3 deprives Father of the equal protection of the law concerning a fundamental right under the Constitution, the right to maintain a parental relationship, in that the classification created by those laws deprives Father of rights he would have in equivalent, but differently defined, situations.

Cases:

In re Marriage of Kohring, 999 S.W.2d 228, 231 (Mo. banc 1999)

In the Matter of Norton, 123 S.W.3d 170, 173 (Mo. banc 2004)

In re Marriage of Woodson, 92 S.W.3d 780 (Mo. banc 2003)

In the Interest of A.S.W., 137 S.W.3d 448 (Mo. banc 2004)

Statutory and Constitutional Authority:

Fifth Amendment to the U.S. Constitution

Fourteenth Amendment to the U.S. Constitution

Article I, § 10 of the Missouri Constitution

§ 452.375.3, RSMo

§ 452.400.1, RSMo

II.

The trial court's refusal to dismiss Father's motion to modify custody correctly applied the law in that, to the extent the provisions of § 452.400.1, RSMo apply to modifications of previously awarded visitation, those provisions violate Father's rights under Article I, § 13 of the Missouri Constitution because divesting Father of his rights to visitation with his children after previously being awarded such rights would deprive him of a substantive right to which he had previously been entitled, and thus would constitute a constitutionally prohibited ex post facto law.

Cases:

Doe v. Roman Catholic Diocese of Jefferson City, 862 S.W.2d 338, 340 (Mo. banc 1993)

Hoskins v. Box, 54 S.W.2d 736 (Mo. App. W.D. 2001)

Heaper v. Brown, 214 B.R. 576, 579 (8th Cir. 1997)

Statutory and Constitutional Authority:

Article I, § 13 of the Missouri Constitution

§ 452.400.1, RSMo

III.

The trial court's refusal to dismiss Father's motion to modify custody correctly applied the law in that, to the extent the provisions of § 452.400.1, RSMo apply to modifications of previously awarded visitation, those provisions violate Father's rights to equal protection of the law under Article I, § 10 of the Missouri Constitution and the Fifth Amendment to the U.S. Constitution as applied to the states by the Fourteenth Amendment, because depriving Father of his rights to visitation with his children is a *de facto* termination of his parental rights, which is the subject of a separate set of statutes, § 211.442, *et seq.*, requiring a different standard and a separate set of procedures.

Cases:

In the Interest of A.S.W., 137 S.W.3d 448 (Mo. banc 2004)

In re S.P.W., 707 S.W.2d 814, 827 (Mo. App. W.D. 1986)

Statutory and Constitutional Authority:

Fifth Amendment to the U.S. Constitution

Fourteenth Amendment to the U.S. Constitution

Article I, § 10 of the Missouri Constitution

§ 211.447, RSMo

§ 452.400.1, RSMo

IV.

The trial court's refusal to dismiss Father's motion to modify custody correctly applied the law in that the restrictions upon the granting of visitation rights listed in § 452.400.1, RSMo are only applicable where a new grant of visitation rights is sought, and not, as here, where Father sought a modification of existing visitation rights.

Case:

State ex rel. Pfitzinger v. Wasson, 676 S.W.2d 533 (Mo. App. W.D. 1984)

Statutes:

§ 452.400, RSMo

V.

The trial court properly found that granting Father unsupervised visitation

with R.S. and J.S. was in their best interests, and properly declared its intention to grant him unsupervised visitation with R.S. after completion of appropriate therapy because those findings were supported by the weight of the evidence in that Dr. Rosen and Dr. Robinson both agreed that Father did not pose a threat to either of the children, Dr. Clark believed that Father was a low risk to commit abuse against the children, Dr. Rohen agreed that Father posed no threat to J.S. and that no supervision was required for Father's exercise of visitation with J.S., all of the experts agreed that Father had never committed any offense against a child of the age of J.S. and R.S., the Guardian ad Litem recommended the discontinuation of supervision after appropriate therapy, and Dr. Rohen believed that an appropriate therapist should be employed to inform the children about the reason for the supervision.

Case:

Wright v. Wright, 975 S.W.2d 212, 215 (Mo. App. S.D. 1998).

Statute:

§ 452.400.2, RSMo

VI.

The trial court correctly granted joint legal custody rights to the parties, as this determination was supported by the weight of the evidence, in that (1) Father's continued participation in the children's lives despite the substantial obstacles preventing that participation demonstrated his dedication to the children; (2) the legislature has made it the explicit public policy of this state "to encourage parents

to participate in decisions affecting the health, education and welfare of their children"; and (3) credible evidence revealed Mother's continued refusal to confer and consult with Father on decisions relating to the children's health, education, and welfare, and Father's desire and willingness to participate in those decisions.

Cases:

A.B.C. v. C.L.C., 968 S.W.2d 214, 219 (Mo. App. S.D.1998)

Cornell v. Cornell, 809 S.W.2d 869, 873 (Mo. App. S.D. 1991)

Sarwar v. Sarwar, 117 S.W.3d 165, 168 (Mo. App. W.D. 2003)

Statute:

§ 452.375, RSMo

VII.

The trial court correctly ordered that Father's current wife could act as supervisor for the exercise of Father's visitation rights in that § 452.400.2, RSMo permits the court to order that visitation take place "in the presence of a responsible adult," the trial court made two specific appointments, including Father's wife, and allowed for the appointment of additional supervisors subject to the approval of the Guardian ad Litem, and no evidence was presented suggesting that Father's wife was not a "responsible person."

Statute:

§ 452.400.2, RSMo

ARGUMENT

I.

The trial court's refusal to dismiss Father's motion to modify custody correctly applied the law in that, to the extent the provisions of § 452.400.1, RSMo apply to modifications of previously awarded visitation, and to the extent the provisions of § 452.375.3, RSMo apply to modifications of previously awarded custody, those provisions violate Father's rights under Article I, § 10 of the Missouri Constitution and the Fifth Amendment to the U.S. Constitution as applied to the states by the Fourteenth Amendment, for the following reasons:

A) Application of §§ 452.400.1 and 452.375.3 deprives Father of a fundamental right under the Constitution, the right to maintain a parental relationship, without due process of law.

B) Application of §§ 452.400.1 and 452.375.3 deprives Father of the equal protection of the law concerning a fundamental right under the Constitution, the right to maintain a parental relationship, in that the classification created by those laws deprives Father of rights he would have in equivalent, but differently defined, situations.

Standard of Review: Statutes are presumed to be constitutional, and, because of this presumption of constitutionality, the burden to prove a statute unconstitutional is upon the party bringing the challenge. This court has stated that it will not invalidate a statute "unless it clearly and undoubtedly contravenes the constitution

and plainly and palpably affronts fundamental law embodied in the constitution." *In re Marriage of Kohring*, 999 S.W.2d 228, 231 (Mo. banc 1999), citing *Linton v. Missouri Veterinary Medical Bd.*, 988 S.W.2d 513, 515 (Mo. banc 1999). The matters raised in this point present only questions of law, and, thus, are for independent determination by this court. *See, All Star Amusement, Inc. v. Director of Revenue*, 873 S.W.2d 843, 844 (Mo. banc 1994) and *City of Cabool v. Missouri State Bd. of Mediation*, 689 S.W.2d 51, 54 [4] (Mo. banc 1985).

Argument:

A.

Section 452.400, RSMo[1] sets forth the standards for establishing and modifying parental visitation rights. Subsection 1 of that statute discusses the *granting* of visitation rights, and subsection 2 sets out the grounds for *modification* of already existing visitation rights. For the reasons set forth in Point IV, below, Father maintains that subsection 1 applies only to situations where a parent has never had rights of visitation, and where a court is considering granting those rights, as opposed to the situation here, where Father's rights had been established for almost seven years before he sought the

[1] As noted by Mother in her brief, this law was amended by the Missouri Legislature in the 2004 session, with the amended version taking effect August 28, 2004. All references to this statute, as well as to § 452.375, RSMo, however, unless specifically noted otherwise, are to the version in effect as of the time the action was commenced. *Hoskins v. Box*, 54 S.W.2d 736 (Mo. App. W.D. 2001).

current modification.

Similarly, § 452.375.3 applies to initial awards of custody, and, for the reasons set forth in Point V, below, Father believes that this statute is inapplicable in the current situation.

However, even if §§ 452.400.1 and § 452.375.3 were applicable to this situation, their application would result in a denial of Father's parental rights without due process of law.

As has been established by a long line of cases, the right to maintain a parental relationship and to raise one's children is a fundamental right, guaranteed under the Missouri and U.S. Constitutions. "[T]he interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citation omitted). "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). "We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected." *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978). The case of *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) discussed "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child."

In *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), that fundamental interest was expressed

as the right to maintain a parental relationship. 519 U.S. at 138 (Rehnquist, dissenting).

In Missouri, this view has been echoed in *Kohring, supra*, where this court stated, "[T]he parent-child relationship is an 'associational right … of basic importance in our society.'" 999 S.W.2d at 232 (citation omitted). *See also, In the Interest of A.S.W.*, 137 S.W.3d 448 (Mo. banc 2004). Sections 452.400.1 and 452.375.3, therefore, are statutes that affect a parent's fundamental, constitutionally protected right.

Where a denial of a fundamental right is affected by a statute, the affected individual is entitled to notice and a right to be heard prior to a court's taking action that would result in his losing that right. *Hamdi v. Rumsfeld*, __ U.S. __, 1124 S.Ct. 2633, 2648 (2004); *Lewandowski v. Danforth*, 547 S.W.2d 470 (Mo. banc 1977).

Section 452.400.1 states,

> The court shall not grant visitation to the party not granted custody if such parent has been found guilty of or pled guilty to a felony violation of chapter 566, RSMo, when the child was a victim, or a violation of chapter 568, RSMo, except for section 568.040, RSMo, when the child was the victim….

Similarly, § 452.375, RSMo states,

> 3. The court shall not award custody of a child to a parent if such parent has been found guilty of, or pled guilty to, a felony violation of chapter 566, RSMo, when the child was the victim, or a violation of chapter 568, RSMo, except for section 568.040, RSMo, when the child was the victim.

Both of these statutes, thus, create a bright line test for the denial of the fundamental right of a parent to associate with his children. If he has been found guilty or has pled guilty to a certain class of felonies, he is forever barred from contact with his child, or any meaningful involvement in his child's life, for so long as that child remains subject to the jurisdiction of the court.

These statutes deprive Father of the opportunity to present evidence to the court of his fitness to care for his children, and, equally important, to present evidence to the court that furthering a relationship between them and their father is in the children's best interests. They not only impinge upon Father's fundamental right to associate with his children, but on the no less compelling fundamental right of the children to associate with their father.

Elsewhere in Chapter 452, the various statutes relating to the custody and visitation of children refer explicitly to the best interests of the children. In § 452.375.2, for example, the law instructs the court to "determine custody in accordance with the best interest of the child," and requires the court to consider "all relevant factors," including eight specifically enumerated factors. Sections 452.400.1 and 452.375.3, however, remove from the court all possibility of determining what is in the child's best interest, because they instruct the court to disregard all factors, save one, *i.e.*, whether a parent been found guilty of a certain class of crimes.

If the purpose of these statutes is, as Mother has suggested in her brief, "to protect children from further abuse at the hands of parents who have molested them in the past," (App. Sub. Br. 39) surely there are less restrictive ways to accomplish that end. The

history of supervised visitation in this case proves this point. Given the stated importance of the "best interests of the child" and the fact that Father's relationship with his children is granted this high level of constitutional protection, Father must have the opportunity to present evidence on his own behalf to allow the court to make a full and complete determination of what is in the children's best interests, including the possibility of supervised or unsupervised visitation.

In ruling that these statutes did not apply to the facts of this case, the court below provided Father with such an opportunity, and Father presented ample evidence to satisfy that burden. If these statutes do apply to these facts, they impermissibly restrict Father's access to the court, and must be stricken.

B.

The dissolution of marriage statutes allow courts to order supervision of visitation "because of allegations of abuse or domestic violence," but then allows for the lifting of supervision when proof is made of treatment and rehabilitation. § 452.400.2, RSMo. Here, however, regardless of proof of treatment and rehabilitation, a parent coming under these draconian restrictions can never recover the rights he has lost.

As discussed above, Father's right to maintain a relationship with his children is a fundamental right, protected under the Missouri and U.S. Constitutions. The statutes in question, §§ 452.400.1 and 452.375.3, impinge on that fundamental right by automatically denying Father the ability to maintain a parental relationship without due process of law. To determine whether or not a statute violates the Equal Protection Clause, the court must apply a two-step analysis. The first prong in the analysis is to

decide whether the classification operates to the disadvantage of a suspect class, or whether the classification "impinges upon a fundamental right explicitly or implicitly protected by the Constitution." *In the Matter of Norton*, 123 S.W.3d 170, 173 (Mo. banc 2004).

These statutes create a class, *i.e.*, parents who have been found guilty of the crimes enunciated in the statutes. Father does not argue that those individuals are members of a suspect class. However, the statute clearly impinges upon their fundamental rights to parent their children. Accordingly, review of those statutes is subject to strict judicial scrutiny to determine whether or not the statutes are necessary to accomplish a compelling state interest. *In re Marriage of Woodson*, 92 S.W.3d 780 (Mo. banc 2003).[2] "To pass strict scrutiny review, a governmental intrusion must … be narrowly drawn to express the compelling state interest at stake." *Norton, supra,* at 173.

The compelling state interest, as articulated by Mother in her brief, is "to protect children from further abuse at the hands of parents who have molested them in the past." App. Sub. Br. 39. However, the class, as designated by these statutes, is not necessary, includes some persons who might present a danger to children while leaving others out, and does not, in and of itself, provide the court with the answer to the ultimate question posed in § 452.375, whether granting visitation or custody would be in the children's best

[2] *Kohring, supra*, differentiates between economic rights of parents, which are not subject to strict judicial scrutiny, and associational rights, which are subject to strict scrutiny. 999 S.W.2d at 232.

interests.

Under the terms of these statutes, a parent could be a serial murderer, an arsonist, or a rapist, and still qualify for an award of visitation or custody. A parent could murder his wife and son and be eligible for visitation with his daughter. But, if that parent has committed one of the crimes enumerated in chapter 566 or chapter 568, he is forever prevented from having any relationship with either child. The effect is the creation of an irrebuttable presumption that strips a person's fundamental, constitutionally protected rights.

The Constitution always demands that fundamental rights, including the right to maintain a relationship with one's children, occupy a cherished and protected place in our society. The Constitution does not permit a legislature to deny a person his freedom of speech on the basis of his abuse of that privilege by committing perjury or treason. Laws that would deny parents their rights on the basis of one factor alone, when due process is afforded in the presence of equivalent factors, stand in the way of that protection, and must be stricken.

II.

The trial court's refusal to dismiss Father's motion to modify custody correctly applied the law in that, to the extent the provisions of § 452.400.1, RSMo apply to modifications of previously awarded visitation, those provisions violate Father's rights under Article I, § 13 of the Missouri Constitution because divesting Father of his rights to visitation with his children after previously being awarded such rights would deprive him of a substantive right to which he had previously been entitled, and thus would constitute a constitutionally prohibited ex post facto law.

Standard of Review: The standard of review set forth in Point I applies to Point II as well.

Argument: On May 28, 2002, Mother filed a motion with the trial court by which she asked the court both to dismiss Father's motion to modify and to terminate all of his visitation rights with both children. L.F. 110, *et seq*. Mother set out the chronology that led to the filing of her motion, and, in so doing, incorrectly stated the status of the law in 1995, at the time of the dissolution of the parties' marriage. L.F. 110.

At that time, the applicable statute, § 452.400.1, RSMo, set out the following standards for ordering visitation to a parent not granted custody of a child:

> 1. A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger the child's physical health or impair his emotional development.

> The court shall define the noncustodial parent's visitation periods in detail at the request of either party. In determining the granting of visitation rights, the court shall consider evidence of domestic violence. If the court finds that domestic violence has occurred, the court may find that granting visitation to the abusive party is not in the best interests of the child. The court shall consider the parent's history of inflicting, or tendency to inflict, physical harm, bodily injury, assault, or the fear of physical harm, bodily injury, or assault on other persons and shall grant visitation in a manner that best protects the child and the parent or other family or household member who is the victim of domestic violence from any further harm. The court shall make specific findings of fact to show that the visitation arrangements made by the court best protects the child or the parent or other family or household member who is the victim of domestic violence from any further harm.

That statute made no reference to crimes of any kind, and gave the court the final discretion to determine whether visitation was in the children's best interests, and, if so, what terms were appropriate under the circumstances. Accordingly, Father was awarded certain rights of supervised visitation. L.F. 16-17.

In 1998, § 452.400 was amended, and language was added that prohibited a court from granting visitation to a parent convicted of certain crimes. The added language stated:

> The court shall not grant visitation to the parent not granted custody

if such parent has been found guilty of or pled guilty to a felony violation of chapter 566, RSMo, when the child was the victim, or a violation of section 568.020, RSMo, when the child was the victim.

In 1999, the parties entered into a consent modification of the judgment of dissolution, under which Father's visitation rights were expanded, but remained supervised. L.F. 40-46.

In 2001, Mother decided to move to New Jersey and the parties entered into a second consent modification of the dissolution judgment in June of that year. L.F. 52-64. Mother, who was represented by the same counsel who represented her in the current action, agreed that Father would continue to exercise supervised visitation with the children. Father, who was unrepresented, agreed to those terms.

In December 2001, Father, citing his substantial treatment and counseling, the lack of any violations in nine years, the increased ages of the children, and his difficulties in exercising his visitation since Mother's move, moved the court to remove the restrictions on his visitation that were still in place, namely, the requirement of supervision. He also asked to be granted joint legal custody, so that he could more fully participate in the children's lives. L.F. 65-68.

Mother responded with her motion to dismiss, stating that § 452.400.1, as amended in 1998, prohibited a court from awarding any visitation with a victim of certain crimes, including the one committed by Father some nine years earlier. L.F. 110-116. She also asked the court to terminate Father's visitation with J.S., who was never a victim of any crime committed by Father, as, "[s]ince visitation is precluded with [R.S.], the

logical, and safest resolution, would be to also terminate visitation with [J.S.]. L.F. 114.

On June 24, 2002, the trial court issued a detailed order and judgment denying Mother's motion to dismiss, on the basis that § 452.400.2 did not apply to a situation where Father already had been granted and was exercising visitation rights, since that statute deals with modification. L.F. 134-140.

The trial court's distinction between **granting** and **modifying** visitation is both reasonable and persuasive. (See Point IV, below.) However, even if the trial court were incorrect in its interpretation, the application of this statute in Father's case would be constitutionally impermissible, because it would serve to take away a substantive right that Father had previously been granted.

Article I, § 13 of the Missouri Constitution states:

> That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted.

As stated by this court in *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 340 (Mo. banc 1993):

> [2] Article I, section 13, prohibits the enactment of any law that is "retrospective in its operation." [Footnote omitted.] Retrospective laws are generally defined as laws which "take away or impair rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already past." [Citations omitted.]

Father's right to associate with his children is a substantive, fundamental right under the Missouri and U.S. Constitutions. Father was granted the right to visitation with his children not just once, but on three separate occasions—at the time of the dissolution judgment, and at two subsequent modifications, consented to by Mother and approved as in the children's best interests by the court.

The application of a law that would take away Father's visitation rights after he had been granted those rights on three separate occasions could not more clearly constitute a constitutionally prohibited *ex post facto* law.

Mother argues that the holding in *Hoskins*, *supra*, disposes of this issue. Her reliance on this case is misplaced. In *Hoskins*, the father received no award of visitation at the time of the dissolution, because he was not permitted contact with the child as a condition of his probation. Section 452.400.1 was subsequently amended, following which he filed a motion with the court seeking an award of visitation. The Court of Appeals ruled that the version of § 452.400.1 that was in effect at the time of the request for modification contained the appropriate standard to apply. The appellate court did not look to § 452.400.2, because the father was being awarded visitation for the first time.

Here, Father has enjoyed visitation rights with his children for over nine years. To deny him any visitation on the basis of a statute that was not in place when he was granted that right would be a gross injustice. Furthermore, had Father known, at the time of his guilty plea, that it would result in the termination of his visitation rights for all time, he might have taken a different course.

Mother also argues that the U.S. Supreme Court's opinion in *Smith v. Doe*, 538

U.S. 84 (2003) applies here, and suggests that the trial court's view of the application of § 452.400.1 is incorrect on that basis. Again, Mother's analysis is flawed.

Smith holds that a law can only be held as an unconstitutional *ex post facto* law where that law imposes punishment after the fact for activity that would not have previously been punishable. That holding is based upon Article I, § 10 of the U.S. Constitution, which forbids retroactive punishment. *Smith, supra,* at 92.

Missouri's *ex post facto* provision, however, comes from Article 1, § 13 of the Missouri Constitution, which has been held to apply not just to retroactive punishment, but also to retroactive removal of substantive rights. The only recognized exceptions to the rule against retroactive application of statutes are,

> (1) where the legislature manifests a clear intent that it be applied retrospectively; and (2) where the statute is procedural or remedial only and does not affect any substantive right of the parties.

Heaper v. Brown, 214 B.R. 576, 579 (8th Cir. 1997).

As neither of these exceptions applies, and as application of the current version of §452.400.1 would result in a revocation of Father's fundamental rights, the judgment of the court should be affirmed.

III.

The trial court's refusal to dismiss Father's motion to modify custody correctly applied the law in that, to the extent the provisions of § 452.400.1, RSMo apply to modifications of previously awarded visitation, those provisions violate Father's rights to equal protection of the law under Article I, § 10 of the Missouri Constitution and the Fifth Amendment to the U.S. Constitution as applied to the states by the Fourteenth Amendment, because depriving Father of his rights to visitation with his children is a *de facto* termination of his parental rights, which is the subject of a separate set of statutes, § 211.442, *et seq.*, requiring a different standard and a separate set of procedures.

Standard of Review: The standard of review set forth in Point I applies to Point III as well.

Argument: Section 211.442, RSMo, *et seq.*, sets forth the requirements and procedures for the termination of parental rights. Section 452.400.1, RSMo, sets forth the requirements for granting visitation rights. However, § 452.400.1 also sets out a bright line test by operation of which a parent *must* be denied visitation rights. Denial of visitation rights as an irrebuttable presumption constitutes a de facto termination of his parental rights, and yet, under § 452.400.1, a parent facing this termination of rights is afforded no opportunity to prove that he is worthy of exercising those rights. By effectively locking a parent out of the courthouse, this statute denies that parent due process of law, as is guaranteed by the Missouri and U.S. Constitutions.

As these two statutes effectively cover the same subject matter, termination of parental rights, they are considered *in pari material*, and the two statutes must be reconciled. If they cannot be reconciled, then the more specific statute must prevail. *KC Motorcycle Escorts, L.L.C. v. Easley*, 53 S.W.3d 184 (Mo. App. W.D. 2001).

Parents enjoy several kinds of relationships to their children. These include the "companionship, care, custody, and management of his or her children." *Stanley, supra,* at 651. As is noted above, these relationships "undeniably warrant deference and, absent a powerful countervailing interest, protection." *Id.*

Under § 211.442, *et seq.*, these interests receive an extremely high level of protection. Section 211.447 sets out numerous grounds for termination. These include "(4) The parent has been found guilty or pled guilty to a felony violation of chapter 566, RSMo, when the child or any child in the family was a victim, or a violation of section 568.020, RSMo, when the child or any child in the family was a victim." That language is actually more restrictive than that contained in § 452.400.1, which includes, as grounds for denial of visitation rights, all of chapter 568, except for § 568.040.

Section 211.447, however, does not set out a bright line test for termination. Rather, it goes on to state,

> 5. The juvenile court *may* terminate the rights of a parent to a child upon a petition filed by the juvenile officer or the division, or in adoption cases, by a prospective parent, *if the court finds that the termination is in the best interest of the child and* when it appears by clear, cogent and convincing evidence that grounds exist for termination pursuant to

subsection 2, 3 or 4 of this section.

(Emphasis added.)

In addition, the burden is on the state to present "substantial evidence," which must be "clear, cogent and convincing," both that the grounds for termination are true, and that the termination is in the child's best interests. *A.S.W., supra*, at 452-53.

Neither Father nor the children are afforded such a high level of protection under the statute in question here. Unlike the standard set forth in § 211.447, only one test must be met to terminate a parent's visitation rights, *i.e.*, proof that he has been found guilty of or pled guilty to a certain class of felonies. A court cannot make an inquiry into the child's best interests beyond that point. It must deny visitation rights, and a parent can never recover those rights.

Although this denial of visitation rights is not termed a "termination of parental rights," the effect is virtually the same. Under the previously existing judgment, Father was not afforded any input into decisions affecting the health, education, and welfare of the children. Under § 452.376, a parent denied visitation rights has no right to receive school progress records and reports. Under § 452.375.10, a parent denied visitation rights has no right to the children's medical, dental, and school records.

The permanent denial of visitation required under § 452.400.1 removes every opportunity for a parent to enjoy any of the benefits of parenthood, and leaves him only with the possibility of sharing in the expenses for the children to participate in activities he will never be able to witness, much less enjoy. He can be required to pay child support, but will not be permitted to exercise any control over how the funds are spent.

He can be required to pay for medical insurance and expenses, but will have no means of finding out about the health of his children. He can be ordered to pay for soccer and baseball teams that he will never see his children play on.

Thus, while it may not be deemed a "termination of parental rights," the removal of visitation rights in some ways is more devastating, as it keeps a parent permanently on the outside of his children's lives, bearing parental burdens with no hope of ever sharing in parental benefits. Father does not argue that he should not be required to participate financially in the lives of his children. Rather, he points out that the court's ability to impose these economic obligations is yet another indication that he is a parent and therefore is entitled to associational rights with his children.

It has been said that, in termination of parental rights cases, "[t]he focus of the juvenile court's inquiry ... should be on the parent's ability or inability to maintain the parental relationship in a manner which would not be detrimental to the child." *In re S.P.W.*, 707 S.W.2d 814, 827 (Mo. App. W.D. 1986), quoting *In re C.P.B.*, 641 S.W.2d 456, 460-61 (Mo.App.1982).

Given the importance attributed to the best interests of the child throughout the termination of parental rights statutes as well as chapter 452, Father must be afforded the same opportunity to a right to be heard as is guaranteed under the Missouri and U.S. Constitutions in terminations of parental rights, and the burden of terminating those rights should be placed back on the state, through the trial court's determination of the best interests of the children. The trial court, recognizing the importance of this right, properly allowed Father this opportunity, properly ruled that he had met his burden and

properly awarded him unsupervised visitation with his children.

IV.

The trial court's refusal to dismiss Father's motion to modify custody correctly applied the law in that the restrictions upon the granting of visitation rights listed in § 452.400.1, RSMo are only applicable where a new grant of visitation rights is sought, and not, as here, where Father sought a modification of existing visitation rights.

Standard of Review: This was a court tried case, and the trial court's judgment is presumed correct. Accordingly, the burden is on the appellant to demonstrate its incorrectness. *State ex rel. Brickner v. Saitz*, 664 S.W.2d 209, 213 (Mo. banc 1984). In this regard, the judgment is to be affirmed unless it erroneously declares the law, erroneously applies the law, is not supported by competent and substantial evidence, or is against the weight of the evidence. *Murphy v. Carron*, 536 S.W.2d 30, 36 (Mo. banc 1976).

The matters raised in this Point present solely questions of law. Accordingly, all matters involving both the declaration and application of the law are for the "independent" determination by this court. *See, All Star Amusement, Inc. v. Director of Revenue*, 873 S.W.2d 843, 844 (Mo. banc 1994) and *City of Cabool v. Missouri State Bd. of Mediation*, 689 S.W.2d 51, 54 [4] (Mo. banc 1985).

Argument: On two separate occasions, both prior to trial and at the commencement of the trial, Mother moved the trial court to dismiss Father's motion to modify on the basis that § 452.400.1, RSMo, prohibited the court from granting Father

any visitation rights. The trial court properly denied these motions.

The text of § 452.400.1 was substantively amended twice after the court entered its original dissolution judgment in 1995.[3] At the time of the dissolution, the trial court retained the discretion to determine whether or not granting visitation was in the children's best interests, regardless of any particular conviction or confession by either parent. It was only later in that year that the legislature added a clause to that statutory section, specifically prohibiting a court from awarding visitation rights to a parent who had committed any of certain felonies. That prohibition was expanded in 1998.

Section 452.400.2 contains provisions relating to the modification of existing visitation orders. That statute states:

> 2. The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child, but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger the child's physical health or impair his emotional development. When a court restricts a parent's visitation rights or when a court orders supervised visitation because of allegations of abuse or domestic violence, a showing of proof of treatment and rehabilitation shall be made to the court before unsupervised visitation may be ordered.

[3] A third substantive amendment was made in the recently concluded legislative session. As pointed out in Point I, footnote 1, however, only the version of the statute in effect at the commencement of this action is before this court.

"Supervised visitation", as used in this section, is visitation which takes place in the presence of a responsible adult appointed by the court for the protection of the child.

The dissolution court awarded Father rights of supervised visitation in February 1995. Father's visitation rights were expanded and changed on two separate occasions after the amendment of § 452.400.1. Both of these modifications were done with the consent of both parties, and with the approval of the court, which stated that the modification on each occasion was in the children's best interests. L.F. 38, 52.

In this instance, Mother based her motions to dismiss the motion to modify, and bases her argument before this court, in the words of Judge Goeke, "on the mistaken belief that the revisions to § 452.400.1 prohibit the modification of visitation, and even require the termination of the supervised visitation previously granted." L.F. 139.

Each time either parent has sought a modification of the existing parenting plan, the standard to be applied was set forth in § 452.400.2. That statute articulates two tests to determine whether or not modification should take place: 1) proof that the modification would serve the children's best interests; and 2) a showing of proof of rehabilitation and treatment.

Each time a post-dissolution motion to change the existing custody plan has been presented to a trial court, it has been a request to *modify*, not *grant* visitation. In the April 21, 1999 modification of the parenting plan, the parties included the following stipulation:

10. [Father] has completed counseling with Behavioral Science

Institute and shall not be required to attend regular counseling sessions with Behavioral Science Institute unless MARIE CLARK determines that additional therapy is required.

L.F. 42.

This stipulation by the parties in 1999 shows Mother believed that Father did not require further counseling, and that she believed that his visitation rights should be expanded, not terminated.

Nothing in the evidence presented in the trial of the current action even suggested, much less proved, that Father's behavior or condition as a potential child abuser had deteriorated in any fashion after 1999. The evidence, rather, pointed in the opposite direction. In the face of this kind of evidence, added to her prior stipulation as to Father's successful completion of treatment, Mother's insistence on suddenly applying a different standard is at least disingenuous, and, at most, a deliberate and desperate attempt to undermine Father's legitimate rights to enjoy a reasonably normal relationship with his children.

In her brief, Mother argues that, even if § 452.400.2 is the appropriate statute to apply, the revised standard, enacted by the legislature and only made law as of August 28, 2004, should be used as the standard for modification. The revision to that statute now prohibits *modification* of visitation where the parent with visitation, *or any other person residing with that parent*, has been convicted of or has pled guilty to a felony under chapter 566 or 568.

As set forth above, the correct statute to apply is the one in effect at the

time of the commencement of the action. Mother points to the case of *State ex rel. Pfitzinger v. Wasson,* 676 S.W.2d 533 (Mo. App. W.D. 1984) for the proposition that a statute enacted after the trial of a case can be applied when use of the previously existing statute "'"would result in manifest injustice."'" App. Sub. Br. 46.

A "manifest injustice" only would occur if a newly revised statutory text were applied depriving Father of his visitation rights, and depriving the children of any hope of a relationship with their father. No manifest injustice occurs when the trial court makes its determination based upon the best interests of the children. The problem of child abuse is definitely a serious one, but it will not and cannot be solved by trampling upon parents' and children's fundamental rights.

V.

The trial court properly found that granting Father unsupervised visitation with R.S. and J.S. was in their best interests, and properly declared its intention to grant him unsupervised visitation with R.S. after completion of appropriate therapy because those findings were supported by the weight of the evidence in that Dr. Rosen and Dr. Robinson both agreed that Father did not pose a threat to either of the children, Dr. Clark believed that Father was a low risk to commit abuse against the children, Dr. Rohen agreed that Father posed no threat to J.S. and that no supervision was required for Father's exercise of visitation with J.S., all of the experts agreed that Father had never committed any offense against a child of the age of J.S. and R.S., the Guardian ad Litem recommended the discontinuation of supervision after appropriate therapy, and Dr. Rohen believed that an appropriate therapist should be employed to inform the children about the reason for the supervision.

Standard of Review: This was a court tried case, and the trial court's judgment is presumed correct. Accordingly, the burden is on the appellant to demonstrate its incorrectness. *State ex rel. Brickner v. Saitz*, 664 S.W.2d 209, 213 (Mo. banc 1984). In this regard, the judgment is to be affirmed unless it erroneously declares the law, erroneously applies the law, is not supported by competent and substantial evidence, or is against the weight of the evidence. *Murphy v. Carron*, 536 S.W.2d 30, 36 (Mo. banc 1976).

As to factual matters, the evidence, together with all possible inferences to be drawn from it, is to be viewed in the light most favorable to the prevailing party. *Gibson v. Adams*, 946 S.W.2d 796, 800 (Mo. App. E.D. 1997); *Hackman v. Sommerfor Development Corp.*, 741 S.W.2d 857, 859 (Mo. App. E.D. 1987). All contrary and conflicting evidence is to be disregarded. *Crawford v. Detring*, 965 S.W.2d 188 (Mo. App. E.D. 1998); *Gerecke v. Gerecke*, 954 S.W.2d 665, 667 (Mo. App. S.D. 1997).

Due regard must be given to the trial court's opportunity to determine both the weight and the credibility due any particular item of evidence. The obligation to give "due regard" has been interpreted to mean that a trial court is "free to believe or disbelieve all, part, or none of the testimony of any of the witnesses." *Darr v. Darr*, 950 S.W.2d 867, 870 (Mo. App. E.D. 1997); *T.B.G. v. C.A.G.*, 772 S.W.2d 653, 654 (Mo. banc 1989); *In re Adoption of W.B.L.*, 681 S.W.2d 452, 455 (Mo. banc 1984). Moreover, in *Darr*, this court held a trial court may disbelieve uncontradicted evidence.

Such deference is required because it is the trial court, not the appellate court, that not only hears the testimony live, but is also able to judge the other intangibles often undetectable from a review of the "cold record." *In re Marriage of Pobst*, 957 S.W.2d 769, 772 (Mo. App. S.D. 1997); *Downey v. Downey*, 696 S.W.2d 336, 337 (Mo. App. S.D. 1985).

In child custody cases, the appellate court is to give "great deference to the trial court's assessment of what serves the best interests of the child, because it is in the better position to judge the credibility of the witnesses, as well as their sincerity, character, and other intangibles not completely revealed by the record." *In re Snoke*, 913 S.W.2d 407,

409 (Mo. App. W.D. 1996). The "paramount concern of [this] court is whether the order serves the best interest of the child[ren]." *Id.*, at 408-09.

Argument: The trial court heard three days of testimony, including live testimony from three experts in sexual abuse, together with deposition testimony from a fourth expert. At the close of that evidence, the court made detailed findings of fact, based upon the standards set forth in § 452.400.2, RSMo, and determined that it was in the best interest of J.S. that supervision be discontinued. L.F. 157. The court went on to keep supervision in place for R.S., but directed the parties to take steps to inform the children of the reason for the supervision. L.F. 159. The court also made a finding that it was in R.S.'s best interests to suspend visitation after she was provided this information about her Father's past. L.F. 158.

Mother's brief focuses solely on the evidence presented that would support her view of the case, *i.e.,* that Father should be cut off from the children for all time. The trial court's order, however, was supported by a large body of evidence, including the following:

- Mark Robinson, the therapist who had the most recent experience working with Father, testified that Father's likelihood of acting out with criminal behavior was low. Tr. 204; Resp. Ex. K. He noted that Father had developed internal controls through years of therapy and treatment that would prevent him from committing an offense. Tr. 205. He also stressed Father's successful completion of the BSI program. *Id.*
- Dr. Dean Rosen, an expert in working with sexual offenders, listed five

different reasons why Father should be permitted unsupervised visitation with his children. These included:

- Father's successful completion of BSI's "tough … highly confrontational" program (Tr. 136);
- Father's ability to take responsibility for his offenses (Tr. 138);
- Father's ability to control his impulses, as evidenced by the ten year period that had passed without his having committed any offenses (Tr. 139);
- Father's lack of sexual attraction to his children (Tr. 140-41); and
- The need for children to have a normal relationship with their father (Tr. 142-43)

- Dr. Terry Rohen, the psychologist who testified on behalf of Mother also echoed his high regard for the program at BSI that Father had completed. Tr. 348-49. He agreed that terminating Father's rights would be harmful to the children, and that it was important for them to maintain a relationship with him. Tr. 340, 346. He agreed that Father had committed no offenses in the past ten years, that Father was not sexually attracted to children, and that Father had behaved well and appropriately over the past ten years. Tr. 354-55, 385-86. He testified that Father posed no threat to R.S., and that supervision was not at all required for visits with R.S. Tr. 359-62.

The standard for modification of a visitation order is set forth in § 452.400.2, RSMo:

> The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child, but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger the child's physical health or impair his emotional development.

Section 452.400.2 further states that, where a court has previously ordered supervised visitation, the affected parent must show "proof of treatment and rehabilitation" before the court can order unsupervised visitation.

The trial court made the following specific findings regarding Father's treatment and rehabilitation:

> 8. Court finds that Father received sexual abuse treatment from Behavioral Science Institute (BSI)….That at the time Father began the BSI program his "Risk Assessment" for future inappropriate behavior as [*sic*] "Extremely High" (the highest risk category). That at the time he was terminated from the BSI program he had successfully completed the program and they assessed his risk as "Low" (the lowest available risk category, there being no "none" category). Court finds from the credible evidence that the BSI program is one of the most difficult programs of its type in the St. Louis area to successfully completed and that someone who successfully completes their sexual abuse program as Father has done has been rehabilitated.

L.F. 156-57.

The court had ample foundation for these findings. Marie Clark's testimony, as well as the letter from BSI, dating back more than four years prior to the trial date, both reflected Father's "low risk" category. Pet. Ex. 6, at 22; Resp. Ex. D.

Mother points out in her brief that Marie Clark's April 1999 testimony rated Father as low risk, with supervision. That assessment, of course, was made three years prior to the trial of the current motion to modify. Father underwent considerable additional therapy thereafter, on a voluntary basis, with Mark Robinson, an expert in the field of sexual offenders, approved by the Missouri State Board of Probation and Parole. Robinson testified that Father's years of therapy and treatment had helped him gain valuable insight into his own behavior, and that he had developed internal controls that would help prevent him from re-offending. Tr. 204-05.

Dean Rosen testified

> that [Father] successfully has been rehabilitated because he can take full responsibility for his offense. He can show appropriate remorse. He can identify the factors that led up to his offense. He can show appropriate empathy for the victim and understands the impact of his behavior.
>
> He has been able to establish adult heterosexual relationships that are satisfying in his current marriage. He has a good support system to turn to with his church and with his wife. He's had good

> relationships with his therapists. All of those factors … lead me to conclude that he's successfully rehabilitated.

Tr. 138.

The court also made the following finding regarding the need for supervision:

> 10. Court finds from the credible evidence that the criteria for the selection of appropriate supervisors for Father's periods of visitation as well as the criteria for the approved supervisors to follow is not [*sic*] longer in the best interest of the children, is now too restrictive due to the age and development of the children and unreasonably interferes with Father's exercise of his visitation….

L.F. 157.

Father had been exercising supervised visits for some seven years when this case was heard. In that period the children had matured from four year old pre-schoolers, to 12 year old pre-teens. Although Terry Rohen, the only testifying psychologist who had actually examined the children, testified that the children had psychological problems, he doubted those problems were related in any way to what Father had done. Tr. 422. He even offered the opinion that, had the abuse not occurred, J.S. might have had the same psychological problems, and that he would have seen his father without supervision. Tr. 426. Rohen saw no reason for any continuation of supervision for J.S. Tr. 359.

Both Robinson and Rosen stated their belief that Father no longer required supervision for visitation with either child. Tr. 144, Resp. Ex. K.

Thus, all three of the experts who appeared in court agreed that no supervision was required for Father to exercise visitation with J.S., and two of the three experts agreed that no supervision was required for either child. The only other expert involved, Marie Clark, had not given any sworn testimony in this matter since 1999, three years before the trial.

Finally, the trial court made findings with regard to the elimination of supervision for R.S. The court's only hesitation in ordering unsupervised visits was the child's ignorance about Father's actions that led to the need for supervision. In that regard, the court made the following finding:

> 12. … Court finds that it is in the children's, and especially [R.S.]'s best interest that they be told of the reason why Father's visitation has been supervised and that [R.S.]'s supervised visitation with Father should be eliminated after the parties have had the opportunity to explain what happened to [R.S.] in the past. Until that time [R.S.]'s visitation with Father shall remain supervised as modified hereinbelow.

L.F. 158.

Both Robinson and Rohen testified that, if supervision were to be eliminated, it was important that the children be told of the reason for the supervision. Tr. 208, 404. Both also suggested that counseling would assist the children in understanding and dealing with the information they would need to be told about their father's past actions. Tr. 182, 406.

In summary, the testimony of four different experts provided the foundation for

the court's findings regarding Father's rehabilitation, and the elimination of supervision.

Mother's brief leans heavily upon the testimony of Terry Rohen, and particularly upon his interpretation of the testing to which he subjected Father. She chooses to ignore the conclusions of Drs. Rosen and Robinson that Father was rehabilitated and no longer required supervision. "The trial judge was fact-finder. He could believe or disbelieve any testimony adduced. He could believe all, part or none of the testimony of any witness." *Wright v. Wright*, 975 S.W.2d 212, 215 (Mo. App. S.D. 1998).

The trial court had ample foundation for its findings. The court's judgment in this regard should be affirmed.

VI.

The trial court correctly granted joint legal custody rights to the parties, as this determination was supported by the weight of the evidence, in that (1) Father's continued participation in the children's lives despite the substantial obstacles preventing that participation demonstrated his dedication to the children; (2) the legislature has made it the explicit public policy of this state "to encourage parents to participate in decisions affecting the health, education and welfare of their children"; and (3) credible evidence revealed Mother's continued refusal to confer and consult with Father on decisions relating to the children's health, education, and welfare, and Father's desire and willingness to participate in those decisions.

Standard of Review: The standard of review set forth in Point V applies to Point VI as well.

Argument: In addition to seeking a removal of the longstanding supervision requirement that Father and the children had endured for over seven years, Father's motion sought to be included in the children's lives in a more meaningful way by being awarded joint legal custody.

With regard to legal custody, the court found:

> 13. Court further finds that it is in the best interest of the children that Mother and Father shall exercise joint legal custody as set forth in the attached Parenting Plan. The children's primary physical custody shall remain with Mother. Mother has failed to confer with Father on major issues, including medical decisions, as set forth in the Parenting Plan.

L.F. 158.

The standard for modification of custody is set forth in § 452.410, RSMo. That statute states:

> …[T]he court shall not modify a prior custody decree unless it has jurisdiction under the provisions of section 452.450 and it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child or his custodian and that the modification is necessary to serve the best interests of the child….

It must be initially noted that this court must presume that the trial court made its custody award in the children's best interests. *A.B.C. v. C.L.C.*, 968 S.W.2d 214, 219 (Mo. App. S.D.1998). "The trial court has broad discretion in determining the custody of a minor child, and we will not disturb its award unless it is manifestly erroneous and the child's welfare requires some other disposition." *Id.*

Here, in finding that a change in the circumstances of the custodial parent had occurred, the court noted that Mother had failed to confer with Father on major issues. L.F. 158. In a separate paragraph, the court found that Mother had interfered with Father's visitation by refusing to allow Michael Clayton to supervise, thus denying Father numerous opportunities to have time with the children. L.F. 157.

In *A.B.C., supra*, the court noted that Missouri has established as its public policy the encouragement of "the continued interest, love, and affection of both parents for their children, and to afford children ample opportunity for close contact with both of them."

968 S.S.2d 214, 219. Therefore, "[i]nterference by one parent with the decretal rights of visitation of the other constitutes a changed condition which may justify and require a modification of custody provisions of a divorce decree." *Cornell v. Cornell*, 809 S.W.2d 869, 873 (Mo. App. S.D. 1991) (citations omitted).

Thus, the court's finding on Mother's interference with visitation alone would be enough to satisfy the first prong of the standard for modification, *i.e.*, a change of circumstances. That finding was amply supported.

In addition to Father's testimony that Mother had denied him the opportunity for visitation on ten separate occasions (Tr. 46), Mother acknowledged that Father had not been able to exercise his visitation on more than one occasion, although she stated that the denials had been because of Father's failure to give her 30 days' notice of the dates he intended to exercise his visits, as is required in the judgment. Tr. 540. Upon further examination, however, Mother acknowledged that she sometimes would come into the St. Louis area, where Father exercised his visitation, with less than 30 days' notice to Father, thus automatically eliminating any possibility of a visit by Father. *Id.*

As evidence of additional necessity to change the custody plan, Father testified that Mother had refused to confer with him on major decisions involving the children. Tr. 47, 259. He also testified that Mother's attempts to terminate his visitation rights entirely directly contradicted the judgment's requirement that both parents use their best efforts to foster the respect, love and affection of the children towards the other parent. *Id.*

Mother's continuing, deliberate campaign to deprive Father of any involvement in

his children's lives was clearly a change in circumstances that could trigger a modification of custody, such as that ordered by the court. Where a parent works to undermine the other parent's relationship with the children, modification "may be necessary because such behavior demonstrates an attitude that the offending parent is not acting in the best interests of the child[ren]." *A.B.C., supra,* at 219.

Mother argues that Father should be deprived of involvement in the decisions affecting the children because the parents do not share a commonality of belief. By deliberately blocking Father's involvement with the children, he has been completely unable to demonstrate the manner in which he would make decisions for the children. The trial court recognized that Mother should not be permitted to benefit by her bad acts.

Greater deference to the trial court is afforded in child custody cases, as it has the only opportunity to deal first hand with the participants and to judge the intangible factors, including the witnesses' credibility. *Sarwar v. Sarwar*, 117 S.W.3d 165, 168 (Mo. App. W.D. 2003). This court should not disturb the trial court's reasonable exercise of its discretion.

VII.

The trial court correctly ordered that Father's current wife could act as supervisor for the exercise of Father's visitation rights in that § 452.400.2, RSMo permits the court to order that visitation take place "in the presence of a responsible adult," the trial court made two specific appointments, including Father's wife, and allowed for the appointment of additional supervisors subject to the approval of the Guardian ad Litem, and no evidence was presented suggesting that Father's wife was not a "responsible person."

Standard of Review: The standard of review set forth in Point V applies to Point VI as well.

Argument: Mother argues that the trial court erred in ordering that Father's wife, D.S., could serve as a supervisor for the children, because of a lack of evidence of her qualifications to so serve. Mother does not, however, offer any legal authority for the argument she advances.

Section 452.400.2 defines "supervised visitation" as

> visitation which takes place in the presence of a responsible adult appointed by the court for the protection of the child.

The trial court made the following orders regarding supervision:

> B. …Father's wife, [D.S.], is approved as a supervisor for Father's visitation with [R.S.]. Additionally, Michael Clayton is approved as a supervisor if [D.S.] is unavailable. The Guardian ad litem, Dudley Dunlop, may approve additional supervisors as requested by either Father or

Mother. The supervisor shall ensure that Father does not sexually abuse or otherwise act inappropriately with [R.S.].

L.F. 159.

Father's goal in his motion to modify was to eliminate the requirement for supervision altogether. Therefore, he did not testify as to D.S.'s qualifications as a supervisor. The Guardian ad Litem, however, did ask Father a series of questions about D.S.'s relationship with the children. Tr. 273, *et seq.* Father testified that D.S. has met the children, accepts the children, buys gifts for the children, and takes very good care of the children. Tr. 274-75. When asked whether he believed she would be "an appropriate and caring person who would provide adequate supervision when [he] couldn't personally be there," he answered, "No doubt." Tr. 275. He further opined that she would take very good care of the children, and that he trusted her "totally." *Id.*

No evidence was presented to the court that contradicted Father's views regarding D.S. The court, thus, had no reason not to believe that D.S. was a responsible adult, suitable to supervise any visits with R.S.

Father's counsel was unable to find any Missouri case that has dealt with the issue of who a court can appoint as a supervisor. Judging from the lack of citations in Mother's brief, she also could not find any such authority. The lack of case law may simply suggest that the broad deference that is given to courts in custody cases extends fully into the area of the appointment of supervisors.

In the absence of evidence proving that D.S. is an inappropriate supervisor, the trial court simply exercised its reasonable discretion, and appointed D.S. as an

appropriate supervisor. There is adequate foundation for the court's action, and it should not be reversed by this court.

CONCLUSION

Mother's appeal should be denied, and the judgment should be affirmed. Further, this court should strike down those provisions of § 452.375 and § 452.400, RSMo, that create an irrebuttable presumption that a person who has been found guilty of certain crimes can never enjoy his constitutionally protected relationship with his children.

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